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Securities Regulation--Wellman v. Dickinson-- Tender Offer Definition Expanded to Include Private Transactions

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NOTES

Securities Regulation—*Wellman v. Dickinson*—"Tender Offer" Definition Expanded to Include Private Transactions

Conventional cash tender offers involve a public invitation to all shareholders of a corporation to deliver shares into a depository for a fixed premium during a limited time.¹ Tender offers flourished in the favorable economic and legal atmosphere of the 1960's, providing an unregulated means of gaining corporate control, despite resistance by hostile management.² In 1967 Congress recognized the solicited shareholder's need for advance information disclosure during a tender offer by passing the Williams Act.³ Con-

1. For discussion of tender offers in general, see R. JENNINGS & H. MARSH, SECURITIES REGULATION 736-48 (4th ed. 1977); E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL (1977) [hereinafter cited as DEVELOPMENTS]; Einhorn & Blackburn, *The Developing Concept of "Tender Offer": An Analysis of the Judicial and Administrative Interpretations of the Term*, 23 N.Y.L. SCH. L. REV. 379 (1978) [hereinafter cited as *Developing Concept*]; Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250 (1973) [hereinafter cited as *Developing Meaning*]; Note, *The Scope of Section 14(d): What Is A Tender Offer?*, 34 OHIO ST. L.J. 375 (1973); Note, *The Courts and The Williams Act: Try a Little Tenderness*, 48 N.Y.U.L. REV. 991 (1973); Note, *Cash Tender Offers*, 83 HARV. L. REV. 377 (1969).

2. The number of tender offers increased from eight in 1960 to over 100 in 1966, H.R. REP. NO. 1711, 90th Cong., 2d Sess. 2 (1968), reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2811 [hereinafter cited as 1968 HOUSE REP.], while the aggregate value of cash offers grew from under \$200 million in 1960 to almost one billion dollars in 1965. *Full Disclosure of Corporate Equity Ownership and In Corporate Takeover Bids: Hearings on H.R. 14475 and S. 510 Before the Subcommittee on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 11 (1968) [hereinafter cited as *1968 House Hearings*]. The sudden popularity of this novel takeover form prompted one treatise author to disclaim that the term "derived from any popular song or current movie . . ." H. BLOOMENTHAL, CASES AND MATERIALS ON SECURITIES LAW 431 (1966).

3. Act of June 29, 1968 (Williams Act), Pub. L. No. 90-439, § 14(d)-(f), 82 Stat. 454, (codified at 15 U.S.C. § 78n(d)-(f) (1976)), as amended by Pub. L. No. 91-567, § 3, 84 Stat. 1497 (amending 15 U.S.C. §§ 77b et seq. (1934)). Subsection 14(d)(1) of the Act, 15 U.S.C. § 78n(d)(1), makes it:

unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce . . . or otherwise to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 12 of this title . . . if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 percentum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in Section 13(d) of this title, and any such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors.

Subsection 13(d)(1), 15 U.S.C. § 78m(d), requires:

(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78f of this title . . . is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition . . . file with the Commission a statement containing such of the following information . . .

(A) the background, and identity, residence and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

gress's failure to define the critical term "tender offer" in the Act,⁴ however, has encouraged aggressive corporate investors to test the term's meaning through unconventional and often ingenious tactics. Particularly notable was Sun Company's (Sun) three-day, secret solicitation of thirty-four percent of Becton-Dickinson Company's (Becton-Dickinson) outstanding stock from thirty-nine major shareholders in early 1978. In *Wellman v. Dickinson*,⁵ a case considering whether Sun's tactics constituted an unlawful "tender offer," the United States District Court for the Southern District of New York found a Williams Act violation and joined a small number of courts favoring a broad interpretation of the Act.⁶ While the decision departs from majority and Second Circuit⁷ understanding of the breadth of congressional intent⁸ in the Williams Act, it serves the Act's spirit without violating its legislative history.

Fairleigh S. Dickinson, Jr., son of a founder of Becton-Dickinson, became disgruntled by his ouster in April 1977 from the company's board of directors.⁹ He recruited the investment banking firm of Salomon Brothers (Salo-

(B) the source and amount of the funds or other consideration used or to be used in making the purchases . . .

(C) if the purpose of the purchases . . . is to acquire control of the business of the issuer, any plans or proposals . . . to liquidate such issuer, to sell its assets to or merge with any other persons . . . or to make any major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owed . . . ; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer . . . naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

.....

4. Although the legislative history does not indicate why Congress failed to define "tender offer," several sources have concluded that an intentional omission resulted from Congress's desire for flexible application of § 14(d) to promote the broad remedial purposes of federal securities laws. See DEVELOPMENTS, *supra* note 1, at 1. Securities Exchange Act Release No. 12,676, [1976-77 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,659, at 86,695-96 (August 8, 1976) [hereinafter cited as 1976 SEC Release]. See text accompanying note 92 *supra*.

5. 475 F. Supp. 783 (S.D.N.Y. 1979).

6. Other cases allowing broad interpretation of "tender offer" are *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579 (5th Cir. 1974); *Hoover v. Fuqua Indus., Inc.*, [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107 (N.D. Ohio 1979); *S-G Sec., Inc. v. Fuqua Inv. Co.*, [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,750 (D. Mass. 1978); *Loew's v. Accident & Cas. Ins. Co.*, Civil No. 74C-1396 (N.D. Ill. August 20, 1974); *Cattlemen's Inv. Co. v. Fears*, 343 F. Supp. 1248 (W.D. Okla. 1972), *vacated per stipulation*, Civil No. 72-152 (W.D. Okla. May 8, 1972). The SEC has naturally urged a broad view of the term in its administrative rulings. See, e.g., *Yellow Freight Systems, Inc.* [1972-73 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,192 (1972) ("adoption clause" in letter mailed to all target shareholders during a merger creates tender offer). See also *Einhorn & Blackburn*, *supra* note 1; Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250 (1973); Note, *Scope of Section 14(d): What is a Tender Offer*, 34 OHIO ST. L.J. 375 (1973).

7. See notes 63-74 and accompanying text *infra*.

8. See notes 88-94 and accompanying text *infra*.

9. This "complex drama embrace[s] personality conflicts, animosity, distrust, and corporate politics . . ." 475 F. Supp. at 797-98. Dickinson had controlled Becton-Dickinson, a New Jersey based hospital supply company, from 1948, when as a private company its sales totalled \$10 million, until 1973, when the public corporation's sales reached \$300 million. *Id.* at 798. Rivals ousted Dickinson as board chairman on April 20, 1977, titling him "Honorary Chairman" but stripping him of all power within the former family enterprise. *Id.* at 799. In September 1977 they fired him as an employee, but Dickinson continued as director until February 13, 1978, one month after Sun's takeover attempt. *Id.* at n.16.

mon) to find a company to buy his stock in conjunction with a Becton-Dickinson takeover.¹⁰ Meanwhile, Sun had contacted Salomon after deciding to diversify its holdings.¹¹ Sun, after studies and discussions with its brokers and lawyers, planned a "privately negotiated transaction" involving secret, simultaneous, off-market purchases from Becton-Dickinson's substantial individual and institutional shareholders.¹²

Beginning January 14, 1978, Salomon first bought approximately 19.3 percent of Becton-Dickinson's outstanding shares from Dickinson, his daughter and two other individuals.¹³ Then, immediately after the stock exchange closed on January 16, Sun employees simultaneously telephoned about thirty institutional shareholders nationwide.¹⁴ They offered to buy Becton-Dickinson shares for either forty-five dollars outright, or forty dollars with protection; the stock had traded that day on the market for about thirty-two dollars.¹⁵

10. Dickinson and Salomon first considered, but rejected, both a proxy fight and selling Dickinson's shares on the open market. *Id.* at 799. F. Eberstadt and Sons, investment bankers, joined Salomon, and from spring 1977 forward, both worked zealously to interest a company in buying part or all of Becton-Dickinson. They solicited Bristol-Meyers, Pepsico, Hewlett-Packard, Avon, American Home Products, Monsanto, Shering-Plough, Hoffman-LaRoche, Squibb, and finally, Sun. *Id.* at 800-05. Most of these companies balked at a hostile takeover. *Id.* at 800.

11. *Id.* at 804. Sun, a Pennsylvania-based corporation and the nation's tenth largest oil company, Wall St. J., July 7, 1979, at 16, planned to diversify by investing outside the energy field. It had intended to acquire a 20-50% interest in three or four companies over a three-year period, investing \$300-400 million in each. *Id.*

12. *Id.* at 805-06. Two proposed meetings between Dickinson and Sun in December 1977 and January 1978 were aborted. *Id.* at 804. On December 27, 1977, Sun, Salomon, Eberstadt, and others discussed a partial tender offer, friendly takeover, and solicitation of substantial individual and institutional shareholders, knowing that 40% of Becton-Dickinson's stock was so held. Sun believed that a 10-13% block of shares, held by Dickinson and three other individuals, plus about 20% held by institutions, were available. *Id.* at 805. On January 9, 1978, lawyers for Salomon and Sun met and agreed that, because tender offer law was "murky" and the concept still imprecisely defined, Sun would solicit no more than 60 shareholders to retain the offer's "private" character and consequent exemption from § 14(d) of the Williams Act. *Id.* Sun determined that 33.3% was the optimal acquisition figure, allowing it use of equity accounting and a significant voice in Becton-Dickinson's direction. *Id.* At discussions on January 10 and 11, strategists rejected a conventional tender offer because subsequent competitive bidding would increase the price, and allow the target company time for legal maneuvering. Instead, they wanted a procedure that would give Sun quick possession of the desired shares. *Id.* at 806. On January 13, Sun's executive committee approved secret off-market purchases and authorized \$350 million for a 34% acquisition. *Id.*

13. Dickinson, who knew Sun's identity and had read its annual report, conditioned sale of his 6.3% interest, *see* 475 F. Supp. 804 (1.2 million shares); 1 MOODY'S INDUSTRIAL MANUAL 1411 (1978) (19,004,586 outstanding shares in September 1977), on a similar offer to his friend Dunning, 475 F. Supp. at 808. The interests of Dickinson's family and friends totalled about 2.5 million shares, *id.* at 802, or about 13% of then outstanding shares. *See* 1 MOODY'S INDUSTRIAL MANUAL 1411 (1978) (13,153 shareholders in September 1977). Sun had prepared a detailed script for soliciting Dickinson and his individual allies, including Dickinson's daughter, Ann Turner, Dunning and one Lufkin (representing a partnership). 475 F. Supp. at 806 n.19. The script outlined the proposed transactions and rules for disclosing Sun's identity. All the individuals and institutions sold to Sun's brokers between January 14-16, 1978. *Id.* at 808-10.

14. "This was a well structured, brilliantly conceived, and well executed project." 475 F. Supp. at 820. At noon on January 16, Sun's telephone solicitors received instructions that stressed absolute confidentiality and explained purchase contingencies. *Id.* at 807-08, n.19. Just after the exchange closed at 4:00 p.m., the telephone blitzkrieg began. Each solicitor, reading from a script and beside a lawyer, generally said that a purchaser, sometimes described as "in the top fifty of Fortune Magazine's 500," sought 20% of Beckton-Dickinson's stock. They ultimately revealed Sun's identity to very few. *Id.* at 810.

15. The two-tiered price offered a higher price (\$45) with no recourse and a lower figure (\$40) with a guaranty to make up the difference between the lower price and the highest price Sun

The callers generally requested responses within half an hour, but always by no later than the next day,¹⁶ and conditioned the purchases on acquiring a total of at least twenty percent of Becton-Dickinson's stock. By midnight, the solicited shareholders had orally committed thirty percent of the target's outstanding shares.¹⁷ Three days later, Sun filed a Schedule 13D, a disclosure statement required by section 13(d) of the Securities Exchange Act of 1934 (1934 Act)¹⁸ when one purchases more than five percent of a class of a company's equity securities.¹⁹ Sun reported acquiring a total of thirty-four percent of Becton-Dickinson's stock.²⁰

The court consolidated for trial seven separate actions arising from this transaction, including the Securities and Exchange Commission's (SEC) charge that Dickinson, Sun, and others had violated sections 14(d) and (e) of the 1934 Act, which, along with section 13(d), were added by the Williams Act in 1968.²¹ The SEC primarily complained that Sun's purchases were a "tender offer" resulting in acquisition of more than five percent of a registered equity security, and unlawful because Sun had failed to make advance disclosures required by the Williams Act in section 14(d).²² In a long opinion that considered several other issues,²³ the court first determined that the program was a public purchase, not a "privately negotiated transaction" exempt from the advance disclosure and filing requirements in section 14(d).²⁴ Next, addressing

eventually paid for any shares. This was a "most favored nation clause." *Id.* at 805, 808. No one chose the \$40 price.

16. Callers said the order "was filling up fast and a hurried response was essential." *Id.* at 810.

17. *Id.* By 5:35 p.m. Sun had verbal commitments for 20% of the stock and a Sun official began calling the institutions to accept on behalf of Sun's subsidiary, L.H.I.W. (an acronym for "Let's Hope It Works"). Sun dispatched couriers to deliver its checks and collect the stock, thus avoiding a depository and ensuring possession before its identity became known. *Id.* The NYSE halted trading in Becton-Dickinson stock from the morning of January 17 until January 23. *Id.* at 810-11. Once Becton-Dickinson learned of the takeover, it vigorously lobbied Congress and the New Jersey legislature for SEC and state investigations, and began a media campaign to discredit Sun. *Id.* at 811.

18. *Id.* at 811. Securities and Exchange Act of 1934, ch. 404, § 14(d), (e), 48 Stat. 881, *as amended by* Act of June 29, 1968 (Williams Act), Pub. L. No. 90-439, 82 Stat. 454 (codified as amended at 15 U.S.C.A. § 78n(d), (e) (1976) [hereinafter referred to as "1934 Act"].

19. *See* note 3 *supra*.

20. 475 F. Supp. at 810-11. All the individual sellers had filed § 13(d) statements by January 24. *Id.* at 811.

21. *Id.* at 790-94.

22. *Id.* Section 14(d) appears in full at note 3 *supra*. The opinion also outlined the civil action against Sun and others, including five consolidated class actions. 475 F. Supp. at 795-97 (and accompanying notes). Consolidation of the civil actions occurred in *Wellman v. Dickinson*, 79 F.R.D. 341 (S.D.N.Y. 1978). Sun later settled these suits by paying the class \$2.6 million. *Wall S.J.*, December 20, 1979, at 17.

23. Judge Carter also discussed the standing of Becton-Dickinson, *id.* at 816-17, and its shareholders, *id.* at 817; due process, *id.* at 825-26; § 13(d)'s filing requirements, *id.* at 826-31, 832-33; aiding and abetting by the brokers, *id.* at 831-32; Rule 10b-13, *id.* at 833-34; the Investment Company Act, 15 U.S.C. § 80a-17(d) to (e) (1976); and various minor issues, *id.* at 834-36. The heavily footnoted opinion spans 54 pages of the reporter.

24. *See* notes 70-74 and accompanying text *infra*. Senator Williams, introducing his bill, recognized the case for pre-offer disclosure of private transactions. But he concluded that § 13(d) disclosure, after consummation of a privately negotiated transaction, "avoids upsetting the free and open auction market," 475 F. Supp. at 818 (quoting 113 Cong. Rec. 856 (1967)), even though private purchases may "relate to shifts in corporate control of which investors should be aware,"

the key question whether Sun's purchases constituted a "tender offer," the court found that because the transaction involved a premium bid for shares and obligated Sun to purchase all or part of those shares upon certain conditions, the scheme fell within the broad definition suggested by Senator Harrison Williams when he introduced the Williams Act.²⁵ The court also tested for the presence of eight elements proposed by the SEC as characteristic of a tender offer;²⁶ it found present seven of those elements, including "active and widespread solicitation"²⁷ of shareholders, but concluded that the eighth element, publicity, was unnecessary²⁸ because the Williams Act's purpose was "to remove the secrecy that had heretofore cloaked transfers of corporate control."²⁹ The court also rejected the argument that seller sophistication could substitute for full disclosure.³⁰

and allow operations "in almost complete secrecy concerning, . . . intentions . . . commitments and even . . . identities." *Id.* at 817 (quoting 113 Cong. Rec. 856, 857 (1967)).

25. 475 F. Supp. at 822. Senator Williams, introducing his bill, described tender offers:

A cash tender offer usually involves a bid by an individual, group, or company to buy a specified number of shares of a corporation's stock from the public at a specified price—which is set above the market price in order to make the offer more attractive. Those accepting such an offer are said to "tender" their shares for purchase.

. . . .

Cash tender offers generally follow a simple pattern. The prospective buyer offers a price far enough above the market to obtain the desired number of shares—usually an amount sufficient to gain operating control of the corporation. As an aid in carrying out his objective, the buyer generally hires a brokerage house to manage the offer, arranges a loan to pay for the purchase, buys a few newspaper ads and issues press releases to shareholders of the "target" company. If the number of shares tendered by stockholders falls below the number desired, then all of the shares are returned and the acquisition plan is cancelled. If the tender offer brings in more stock than the specified number of shares bid for, the offeror may at his option buy only the number of shares for which he has bid or may buy all of the stock tendered.

113 Cong. Rec. 855, 857 (1967).

The Senate Report accompanying the bill likewise identified as tender offer attributes a bid, premium price, tender by shareholders, and the buyer's conditional obligation, S. REP. NO. 550, 90th Cong., 1st Sess. 2 (1967) [hereinafter cited as 1967 SENATE REP.], and the House Report adopted an identical definition. 1968 HOUSE REP., *supra* note 2, at 2.

26. In recent cases, the SEC has suggested that courts consider eight factors when examining a possible tender offer. Those elements are: (1) active and widespread solicitation of public shareholders for an issuer's shares; (2) solicitation of a substantial percentage of the issuer's stock; (3) an offer to purchase at a premium above market price; (4) firm, non-negotiable offering terms; (5) purchases conditioned upon obtaining a set number of shares, often subject to a fixed maximum; (6) limited time for offering; (7) pressure on offerees to sell; (8) public announcements of the purchasing program preceding or accompanying rapid share accumulation. 475 F. Supp. at 823-24.

27. *Id.* at 824.

28. *Id.* at 822, 824-25. The court did not consider "the absence of one particular factor fatal . . . because depending upon the circumstances . . . one or more . . . elements . . . may be more compelling and determinative than the others," *id.* at 835, and it dismissed the absence of publicity as insignificant to its decision. *Id.* Judge Carter called use of newspaper advertisements a recent phenomenon caused by management efforts to block access to shareholder's lists. *Id.* at 822 (citing 1967 SENATE REP., *supra* note 25, at 229).

29. *Id.* Senator Williams had perceived as "[t]he essential problem in transfers of control resulting from cash tender offers or open market or privately negotiated purchases . . . that persons seeking control in these ways are able to operate in almost complete secrecy concerning their intentions, their commitments and even their identities." 113 Cong. Rec. 855 (1967) (remarks of Senator Williams).

30. 475 F. Supp. at 823. *But see* *Brascan Ltd. v. Edper Equities, Ltd.* [1978-79 Transfer

Even more important to Judge Carter than the particular elements of a "tender offer," however, was that "Sun's acquisition [was] infected with the basic evil which Congress sought to cure by enacting the law."³¹ He concluded that the purchase

was designed in intent, purpose and effect to effectuate a transfer of at least a 20% controlling interest in BD to Sun in a swift, masked maneuver. It would surely undermine the remedial purposes of the Act to hold that this secret operation, which in all germane respects meets the accepted definition of a tender offer, is not covered by Section 14(d), . . . because Sun's coup was not heralded by widespread publicity and because no shares were placed in a depository.³²

Judge Carter refused to issue an injunction against future violations, instead ordering maintenance of the status quo until he could determine damages in the trial's second phase.³³ During the damages trial in December 1979, Sun and Becton-Dickinson reached an out of court settlement in which Sun agreed to divest its Becton-Dickinson shares.³⁴

Until the 1960's, corporate takeovers typically proceeded either by proxy solicitations, regulated under the 1934 Act,³⁵ or securities exchange offers, subject to 1933 Act registration requirements.³⁶ Cash tender offers proliferated during the 1960's, exploiting a "gap in the existing scheme of investor protection."³⁷ A typical cash tender offer then involved a formal, public offer to all of a corporation's shareholders, to tender shares into a depository at a uniform premium price.³⁸ Senator Williams first introduced a bill requiring advance disclosure by tender offerors in 1965.³⁹ He sought to regulate the process whereby "proud old companies [were] reduced to corporate shells after white

Binder] FED. SEC. L. REP. (CCH) ¶ 96,882 (S.D.N.Y. 1979) (court found no tender offer upon purchase from a few sophisticated investors).

31. 475 F. Supp. at 822.

32. *Id.* at 822-23.

33. *Id.* at 837.

34. SEC v. Sun Co. [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,209 (S.D.N.Y. 1979) (settlement and divestiture agreement). See also SEC v. Sun Co. [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,280 (S.D.N.Y. 1980) (settlement modification); Wall St. J., December 20, 1979, at 17, col.2. Sun agreed to disgorge its Becton-Dickinson shares by issuing 25 year, exchangeable debentures to the public. *Id.*

35. Section 14 of the 1934 Act, 15 U.S.C. § 78n (1976). In proxy contests, management and outsiders vie for corporate control by soliciting shareholder votes. See, e.g., Piper v. Chris Craft Indus., Inc., 430 U.S. 1, 22 (1977).

36. 15 U.S.C. § 77a-77aa (1976). A Securities exchange offer occurs when a corporation offers its securities to the shareholders of another corporation in exchange for the target's shares. Each offeree may individually accept or reject the offer. See R. JENNINGS & H. MARSH, SECURITIES REGULATION 448 (4th ed. 1977).

37. 1968 House Hearings, *supra* note 2, at 10 (statement of SEC Chairman Manual Cohen).

38. Descriptions of tender offers typical during the 1960's appear in C. SCHARF, ACQUISITIONS, MERGERS, SALES AND TAKEOVERS 160 (1971); Fleischer & Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. PA. L. REV. 317, 335-37 (1967); Hayes & Taussig, *Tactics of Cash Takeover Bids*, HARV. BUS. REV. 135, 141 (Mar.-Apr. 1967); Sowards & Mofsky, *Corporate Takeover Bids: Gap in Federal Securities Regulation*, 41 ST. JOHN'S L. REV. 499, 502 (1967); Comment, *Regulation of Contested Cash Tender Offers*, 46 TEX. L. REV. 115, 115-16 (1968); Comment, *Senate Bill 510 and the Cash Tender Offer*, 14 WAYNE L. REV. 568, 569 (1968); Note, *Economic Realities of Cash Tender Offers*, 20 ME. L. REV. 237, 241 (1968).

39. S. 2732, 89th Cong., 1st Sess., 111 Cong. Rec. 28,257 (1965).

collar pirates have seized control with funds from sources which are unknown in many cases, then sold or traded away the best assets, later to split up most of the loot among themselves."⁴⁰ A revised version of Senator Williams's bill became law in 1968.⁴¹

The Williams Act prohibits tender offers involving purchase of more than five percent of the stock of a company registered under section 12 of the 1934 Act,⁴² unless the offeror has first filed with the SEC a statement revealing its background and identity, fund sources and amounts, holdings in the target company, and plans for the target's business or corporate structure.⁴³ As noted earlier, however, the Act did not define the crucial term "tender offer," leaving courts and the SEC to determine just what takeovers will trigger application of its advance disclosure requirements. The SEC had consistently refused to suggest a definition of the term until November 1979,⁴⁴ when it reversed its position and for the first time proposed a broad, two-tiered definition of "tender offer"⁴⁵ that would clearly comprise the tactics used in the Becton-Dickinson takeover attempt.⁴⁶

Tender offers, until the early 1970's, generally conformed to a conventional pattern.⁴⁷ A corporate investor, seeking control of a target company, would hire an investment banking firm to manage the offer, then buy newspaper ads announcing a non-negotiable, premium price for the target's shares. The offer would request shareholders to tender their shares into a depository within a limited time. The depository could return the shares if the number tendered fell below that specified in the offer, and the bidder could prorate share purchases if shareholders tendered more than the desired number.⁴⁸

The first case finding an unconventional tender offer unlawful appeared in 1972. In *Cattlemen's Investment Co. v. Fears*,⁴⁹ the only case before *Wellman* holding an ostensibly private transaction to be a tender offer,⁵⁰ the bidder acquired over five percent of the target's stock by soliciting almost all the

40. 111 Cong. Rec. 28,257 (1965).

41. Williams Act, 15 U.S.C. § 78n(d)-(f) (1976); see note 3 *supra*. While revising the bill, Senator Williams consulted with SEC staff, NYSE members, private industry representatives, and others. 113 Cong. Rec. 854 (1967).

42. 15 U.S.C. § 78n(d)(1) (1976). The original Williams Act applied only to acquisitions exceeding 10% of the target's stock, but in 1970 Congress amended § 14(d) to apply to acquisitions exceeding five percent. Pub. L. 91-567, § 3, 84 Stat. 1497 (1970).

43. 15 U.S.C. §§ 78n(d)(1), 78m(d) (1976); see note 3 *supra*.

44. In the 1976 SEC Release, *supra* note 4, at 86,695-96 (1976), the SEC concluded two years of hearings on tender offers by expressly refusing to define the term because of its "dynamic nature" and congressional intent that the term remain flexible. *Id.*

45. Regulation 14D, 17 C.F.R. § 240.14d-1 to 14d-101 (1979). Proposed Rule 14d-1(b), Securities Exchange Act Release No. 16,385, [Current Transfer Binder] CCH FED. SEC. L. REP. ¶ 82,374, at 82,603 (November 29, 1979) ("Proposed Rule").

46. The definition elements are discussed at notes 94-95 and accompanying text *infra*.

47. See text accompanying notes 35-38 *supra*.

48. See note 25 *supra*.

49. 343 F. Supp. 1248 (W.D. Okla. 1972), *vacated per stipulation*, Civil No. 72-152 (W.D. Okla. May 8, 1972). See 1972 DUKE L.J. 1051 (1972). *Cattlemen's* involved a "creeping tender offer," a series of purchases aimed at corporate control without public announcement. *Einhorn & Blackburn, supra* note 1, at 384 n.20.

50. DEVELOPMENTS, *supra* note 1, at 3.

shareholders by telephone, letters and personal visits during a forty day period.⁵¹ Even though no publicity accompanied the overtures, the court held that the "active and widespread solicitation" was a Williams Act tender offer, because the tactics forced a hurried investment decision.⁵² The court implicitly assumed that such broadbased solicitation removed any private quality from the purchasing program.⁵³ The short opinion, however, did not explore the Williams Act's legislative history, or identify the precise foundation for its conclusion. Perhaps as a result, the only decisions accepting *Cattlemen's* have involved notice to all shareholders, by mail or public advertising, and solicitation of a relatively large number of shareholders.⁵⁴

One year after *Cattlemen's*, a law review author suggested that methods of securities acquisition that "are capable of exerting the same sort of pressure on shareholders to make uninformed, ill-considered decisions to sell which Congress found the conventional tender offer was capable of exerting" should be classified as tender offers under the Williams Act.⁵⁵ This "shareholder impact theory" has since expressly or implicitly appeared in every decision considering whether an unconventional takeover method constituted a tender offer. Few courts, however, have actually adopted the test, and most have rejected it, especially when the solicitations reached only a small number of shareholders.

For example, in *Nachman Corp. v. Halfred*,⁵⁶ an Illinois federal district court found no tender offer occurred when the bidder solicited forty of the target's 600 shareholders, and ultimately achieved control by buying from a financially sophisticated, "relatively small and powerful group" of fourteen.⁵⁷ Ostensibly applying the "shareholder impact test," the court nevertheless

51. Fears, the bidder, originally owned 4.86% of *Cattlemen's* shares, and eventually acquired a total of 10%. 343 F. Supp. at 1250.

52. *Id.*

53. See DEVELOPMENTS, *supra* note 1, at 5.

54. See, e.g., *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579 (5th Cir.), cert. denied, 419 U.S. 873 (1974) (tender offer occurred when, during merger, purchaser mailed premium offer to all shareholders, imposed percentage requirements, and used depositary); *Hoover v. Fuqua Ind., Inc.* [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107 (N.D. Ohio 1979) (bidder sent letters to family group composing 1% of shareholders but owning 41% of target's shares, offering premium price, while target issued press releases); *S.G. Sec., Inc. v. Fuqua Inv. Co.*, [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,750 (D. Mass. 1978) (bidder announced purchasing plan, then bought 20% of target's shares during eight days from individuals and on exchange); *Loew's v. Accident & Cas. Ins. Co.*, Civil No. 74C-1396 (N.D. Ill. August 20, 1974) (tender offer occurred when state distributed bidder's purchase plans to all target's shareholders just before purchases occurred). *Contra*, *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195 (2d Cir. 1978); *Brascan, Ltd. v. Edper Equity, Ltd.*, [1978-79 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,882 (S.D.N.Y. 1979); *Financial Gen. Bankshares, Inc. v. Lance*, [1978-79 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,403 (D.D.C. 1978), reconsideration denied, [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,511 (D.D.C. 1978) (no tender offer where bidder solicited 30 of corporation's 9,600 shareholders on open market and privately, at premium); *D-Z Inv. Co. v. Holloway*, [1974-75 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,771 (S.D.N.Y. 1974); *Nachman Corp. v. Halfred, Inc.*, [1973-74 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,799 (N.D. Ill. 1974) (settlement).

55. *Developing Meaning*, *supra* note 1, at 1275. *Contra*, *Developing Concept*, *supra* note 1, at 396.

56. [1973-74 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,799 (N.D. Ill. 1974) (settlement).

57. *Id.*, at 96,592.

found the shareholders by nature unpressurable and in fact unpressured in their selling decision.⁵⁸ The *Nachman* court misinterpreted the test, which examines the potential rather than actual pressure of a transaction,⁵⁹ and apparently concluded that such a small group of shareholders was insufficiently "widespread" under the *Cattlemen's* requirement of "active and widespread participation."⁶⁰ In *D-Z Investment Co. v. Holloway*⁶¹ a New York federal district court reached a similar result. There, however, the court expressly refused to apply the "shareholder impact test" to a program combining market purchases with solicitation of twenty-four sophisticated shareholders and four institutions in three months. Again, the small number of shareholders involved, rather than the manner or potential effect of solicitation, apparently directed the decision.⁶²

Other federal courts in the Second Circuit, where *Wellman v. Dickinson* arose, have quite recently disapproved the "shareholder impact" concept, and have declined to extend Williams Act protection to novel takeover strategies. In *Kennecott Copper, Inc. v. Curtiss Wright Corp.*,⁶³ for example, the United States Court of Appeals for the Second Circuit determined that no tender offer occurred in off-floor solicitations of fifty individual and twelve institutional shareholders during forty-three trading days. The court found that no unusual pressure existed and concluded that the Williams Act's substantive provisions could not practically apply to unorthodox transactions.⁶⁴ The *Kennecott* transactions, however, bore few tender offer characteristics, such as premium price, deadlines, and purchase contingencies, and most purchases occurred on the exchange.⁶⁵

Similarly, in *Brascan, Ltd. v. Edper Equities, Ltd.*,⁶⁶ a case decided six weeks before *Wellman* by the United States District Court for the Southern District of New York, Judge Leval declined to apply the Williams Act to a takeover in which the bidder's broker "scouted" thirty to fifty institutional and twelve individual shareholders of the target company, offering to buy shares at an "agreeable price."⁶⁷ The court, finding no tender offer "hallmarks," rejected cases effectively accepting the "shareholder impact test."⁶⁸ The *Brascan*

58. *Id.* at 96,591.

59. Even though the bidder repeatedly threatened the target's directors and president with removal and corporate dissolution, *id.*, the court somehow found no actual coercion, and therefore no Williams Act violation. *Id.* It thus misread both the Williams Act and the "shareholder impact test" in analyzing this purchase of 30% of the target's stock.

60. See text accompanying note 52 *supra*.

61. [1974-75 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,771 (S.D.N.Y. 1974).

62. The *D-Z Investment Co.* court found the "shareholder impact test" overly broad, and even applying it in dictum, found that the purchases did not satisfy the test. *Id.* at 96,563.

63. 584 F.2d 1195 (2d Cir. 1978).

64. *Id.* at 1207.

65. *Id.* at 1198.

66. [1978-79 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,882 (S.D.N.Y. 1979).

67. *Id.* at 95,631.

68. The *Brascan* court said that Edper acquired "a large amount of stock in open market purchases, bidding cautiously so as to avoid bidding up the price of the stock to excessive levels unless there was a large volume available at such a price. This [was] not a tender offer, even if a large volume of stock [were] accumulated in such fashion." *Id.* at 95,631. The court characterized

Court found the Williams Act inapplicable to "open market" purchases, and predicted that "crippling uncertainty" would result from adopting the SEC's unfounded, eight-element tender offer test.⁶⁹

The *Wellman* opinion offers a more expansive interpretation of the Williams Act. Judge Carter's first step was to consider whether Sun's program was a "privately negotiated purchase," exempt from section 14(d)'s⁷⁰ advance disclosure requirements but subject to section 13(d)'s⁷¹ post-acquisition filing requirements. To determine whether soliciting only thirty-nine shareholders was not a private transaction, the court analogized to section 4(2) of the 1933 Act, which exempts "private offerings" from that Act's registration requirements.⁷² Those exemptions, however, are available only when an offeree, capable of fending for himself, enjoys or can compel such substantial access to information about the offeror that formal disclosure through the SEC would not further the purposes of the securities laws.⁷³ In the *Wellman* transactions, however, most offerees were unaware of Sun's identity. Although Judge Carter did conclude that this was not a "privately negotiated purchase," only the most cursory analysis should have been necessary to determine that Sun's scheme did not bear any meaningful resemblance to private offerings exempt under section 4(2).⁷⁴

Judge Carter accepted the SEC's proposal that courts consider eight factors when analyzing whether section 14(d)'s advance disclosure requirements

the reasoning of *Cattlemen's Inv. Co. v. Fears*, 343 F. Supp. 1248 (W.D. Okla. 1972), *vacated per stipulation*, Civil No. 72-152 (W.D. Okla. May 8, 1972) and *S.G. Sec. v. Fuqua Inv. Co.*, [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,750 (D. Mass. 1978) as follows: "[S]ince the purpose of the Williams Act is to remedy certain problems found in tender offers, and since similar problems are to be found in other forms of stock accumulation, the Williams Act should cover other forms of accumulation even though they aren't conventional." [1978-79 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,882, at 95,631 (S.D.N.Y. 1979). The court cited "serious problems with this result-oriented approach," asserting that the

Williams Act legislative history shows it was passed with full knowledge of the difference between tender offers and other forms of large-scale stock accumulation; its regulatory scheme is inapplicable to a pattern of open market purchasing; and the SEC's eight-factor test expands "tender offer" beyond the scope of Congressional intent.

Id. at 95,631-32.

69. *Id.* at 95,632.

70. 15 U.S.C. § 78n(d)(1) (1976). The Williams Act nowhere expressly distinguishes private from public transactions, or exempts private purchases. Senator Williams, however, in proposing the bill, expressly concluded that private purchases should be excluded, 113 Cong. Rec. 856 (1967); see note 25 *infra*; and no one has ever suggested otherwise. See 475 F. Supp. at 817-18.

71. 15 U.S.C. § 78m(d) (1976).

72. Section 4(2), 15 U.S.C. § 78m(d) (1968), exempts from registration under the 1933 Act "transactions by an issuer not involving a public offering." Private offerings, to receive the exemption, must meet very strict criteria established by case law, and generally only institutional purchasers who enjoy complete access to information about the offering institution are exempted. See Rule 146.

73. *Ralston-Purina Co. v. SEC*, 346 U.S. 119 (1953), the seminal case interpreting the § 4(2) exemption, held the exemption available only when the offerees could "fend for themselves," *id.* at 125, and because of their position have access to all the information that the 1933 Act would make available through a registration statement, *id.* at 123.

74. The court eventually concluded that the transaction was not "private" because of the number and relationships among sellers, and the size and manner of the tender offering. 475 F. Supp. at 819.

apply to an unconventional takeover.⁷⁵ He readily found present six elements of that test: solicitation of a substantial percentage of the issuer's stock; premium price; non-negotiable terms; purchase conditioned upon obtaining a set minimum; limited time; and selling pressure.⁷⁶ Carter also quickly found present the test's first element, "active and widespread solicitation,"⁷⁷ but incompletely treated this important factor. Sun contacted only about thirty-nine, or .3% of Becton-Dickinson's 13,000 shareholders;⁷⁸ this was hardly "widespread" bidding. No prior case had found a tender offer upon secret solicitation of such a small percentage of shareholders.⁷⁹

The American Law Institute's proposed Federal Securities Code suggests that soliciting more than thirty-five shareholders constitutes a tender offer, regardless of how the offer proceeds.⁸⁰ Sun, having solicited about thirty-nine shareholders, exceeded that limit, though perhaps unintentionally. Even had Sun solicited fewer than thirty-five shareholders, however, the *Wellman* court, focusing as it did on the transaction's substance, rather than its form, would probably have still concluded that a tender offer occurred. Indeed, the result Sun achieved by soliciting such a small shareholder group demonstrates that a numerical limit alone will not prevent abuses.⁸¹ Instead, a numerical limit should create only a presumption that the transaction is a tender offer, and solicitations of fewer than that number, upon proper proof, should also be subject to section 14(d).⁸²

The *Wellman* court properly resisted Sun's argument that publicity, the

75. *Id.* at 824.

76. *Id.* at 824-25.

77. *Id.* at 824.

78. Defendant's Pretrial Brief No. 1 at 5, *Wellman v. Dickinson*, 475 F. Supp. 783 (S.D.N.Y. 1979).

79. In *Brascan, Ltd. v. Edper Equities, Ltd.*, [1978-79 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,882 (S.D.N.Y. 1978), the court found no "active and widespread solicitation of public shareholders" because solicitations reached "only approximately [fifty] of Brascan's 50,000 shareholders, each . . . being either an institution or sophisticated individual holder of large blocks of Brascan shares." *Id.* at 95,632. The same result occurred in *Financial Gen. Bankshares, Inc. v. Lance*, [1977-78 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,403 (D.D.C. 1978), in which 30 sophisticated shareholders out of 9600 were contacted, and in *D-Z Inv. Co. v. Holloway* [1974-75 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,771 (S.D.N.Y. 1974), market purchases combined with four private purchases from institutions, did not meet the "widespread" solicitation test. In *Hoover v. Fuqua Indus., Inc.* [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,107 (N.D. Ohio 1979), however, the bidder's solicitation of about 100 shareholders out of 9,585, MOODY'S OTC INDUSTRIAL MANUAL 952 (1978), owning 41% of the target's stock, was held to furnish sufficiently "widespread" solicitation.

80. ALI FED. SEC. CODE § 299.68 (Prop. Official Draft March 15, 1978). This is known as the "bright line" test.

81. Becton-Dickinson's highly concentrated shareholder mix before the acquisition, with 813 shareholders, many of them institutions, holding 17.5 million of the 19 million shares, *id.* at 802, made the company more vulnerable to Sun's tactics than the average company. Studies, however, show increasing concentration of shareholdings in large institutions, with the estimated percentage held by institutional investors increasing from 14.5% in 1949 to 33.6% in 1975. NEW YORK STOCK EXCHANGE FACT BOOK 50 (29th ed. 1979). This trend suggests the undesirability of a numerical limit in the tender offer definition.

82. See Moylan, *Exploring the Tender Offer Provisions of the Federal Securities Laws*, 43 GEO. WASH. L. REV. 551, 581-82 (1968). Some commentators have urged that the factors truly crucial to a tender offer are the number and percentage of shareholders solicited, percentage being the more significant. See *Developing Concept*, *supra* note 1, at 396-97.

SEC test's eighth element, is necessary for finding a tender offer, even though widespread knowledge among the target's shareholders, whether achieved by mailings or public announcements, has appeared in all previous cases applying the Williams Act to unorthodox tender offers.⁸³ Judge Carter reasoned that Congress had disdained secrecy in transfers of corporate control,⁸⁴ but failed to articulate the truly important point: publicity is relevant only because of its potential for creating pressure upon shareholders. Potential selling pressure was the unidentified "basic evil"⁸⁵ attacked in *Wellman*; both a "swift, masked maneuver"⁸⁶ shrouded in secrecy, such as Sun's purchases, and conventional, publicized tender offers carry that potential. Judge Carter, however, did not discuss the "shareholder impact" idea in distinguishing and rejecting other cases, perhaps because most of those cases have explicitly rejected that test.⁸⁷

Commentators have urged a legislative definition of "tender offer," to relieve uncertainty in financial and legal circles and to avoid disruption and confusion in corporate management.⁸⁸ The plights of Sun, having agreed to divest its ill-gotten holdings through a complicated sale,⁸⁹ and Becton-Dickinson, whose stock value declined after the takeover attempt,⁹⁰ epitomize the disruption feared by those who seek legislative definition. Yet as recently as February 1979,⁹¹ the SEC had formally declined to define the term because of the "dynamic nature of these transactions and the . . . [Commission's] . . . need to remain flexible in determining what types of transactions, either present or yet to be devised, are or should be encompassed within the term."⁹²

83. See note 47 and accompanying text *supra*.

84. 475 F. Supp. at 822, 825.

85. *Id.* at 822.

86. *Id.* at 823.

87. See text accompanying notes 56-68 *supra*. The court also rejected Sun's argument that the Williams Act's language and substantive structure rendered the Act inapplicable to unorthodox takeover attempts. See Defendant's Pretrial Brief No. 1, *supra* note 78, at 50-54. Specifically, Sun had urged that by their terms pertinent subsections could not apply to its takeover. They argued that the following sections had not been violated: § 14(d)(1), requiring information filing before "copies of the offer . . . are first published or sent or given to security holders;" § 14(d)(5), mentioning securities "deposited" with a depository; and § 14(d)(7), requiring payment of increased prices to all tenderors, when shareholders had deposited stock in depositories. *Id.* at 50-53. See Note, *Scope of Section 14(d): What is a Tender Offer?*, *supra* note 1, at 389 (any transaction to which subsections 14(d)(5)-(7) cannot practically apply does not constitute a tender offer). Judge Carter quickly rejected these arguments, however, because nowhere does § 14(d) require these characteristics or restrict "tender offer" to such applications. He also noted that Sun distrusted depositories because it wanted "physical possession of the stock certificates as quickly as possible." 475 F. Supp. at 823.

88. See DEVELOPMENTS, *supra* note 1, E. ARANOW & H. EINHORN, *TENDER OFFERS FOR CORPORATE CONTROL* 76 (1973); Note, *Cash Tender Offers*, 83 HARV. L. REV. 377, 389 (1969).

89. See note 31 and accompanying text *supra*.

90. Becton-Dickinson's stock declined \$1.25 per share to \$34, one day after the *Wellman* opinion was announced. Wall St. J., July 11, 1979, at 16. On December 22, 1979, the stock traded at an average price of \$33 per share, Raleigh News & Observer, December 22, 1979, at 23, and in May 1980, it sold at \$34 per share. Wall St. J., May 23, 1980, at 46. Also, the number of Becton-Dickinson shareholders dropped from 13,135 in September 1977, 1 MOODY'S INDUSTRIAL MANUAL 1411 (1978), to 11,426 one year later. 1 MOODY'S INDUSTRIAL MANUAL 1453 (1979).

91. Securities and Exchange Act Release No. 15,548 [1979 Transfer Binder] ¶ 81,935, at 81,213 (February 5, 1979).

92. 1976 SEC Release, *supra* note 4.

The Commission finally departed from its policy of non-definition in November 1979 by proposing a broad, two-tiered definition of "tender offer."⁹³ The proposed rule's first tier would extend Williams Act coverage to transactions bearing four characteristics: 1) an offer to purchase, or solicitation of an offer to sell, securities; 2) during any forty-five day period; 3) directed to more than ten persons; 4) that seeks to acquire more than five percent of that class of securities.⁹⁴

Independently, the definition's second tier would reach transactions showing three qualities: 1) widespread dissemination of the offers or solicitations; 2) at a premium price greater than both five percent of, or two dollars above, the security's current market price; and 3) without meaningful opportunity to negotiate price and terms.⁹⁵

Clearly the proposed definition responds directly to Sun's imaginative tactics, which would certainly fall within the first tier's reach, and would also be embraced by the second tier, assuming Judge Carter's interpretation of "widespread dissemination" endures. Final adoption of the proposed rule would effectively codify in the Regulations the *Wellman v. Dickinson* holding. The proposed rule narrows that holding only by establishing ten persons as the minimum number of offerees necessary for a tender offer, as courts would unlikely find less than that number sufficiently "widespread" under the definition's second tier.⁹⁶

Any administrative or congressional definition of "tender offer" stricter than the proposed rule appears unwise. Recent cases such as *Wellman*, and well-known SEC interpretations of the term, give fair notice to bidders of the criteria courts may consider in determining Williams Act coverage. Indeed, even before *Wellman*, one could sense the danger of purchasing tactics that potentially created pressure to sell without adequate information. Further definition of "tender offer," a term of art, could bar its development along with changing takeover methods, and invite ingenious investors such as Sun to violate the prohibition's spirit by complying with its letter.⁹⁷

93. Proposed Rule, *supra* note 45. The SEC, reiterating earlier themes, based the proposed definition on the "complexity of securities transactions, the diverse and dynamic nature of tender offers, and the need to provide adequate protection of investors within the purposes of the Williams Act," and concluded that the "two-tier approach . . . is feasible, and capable of providing guidance and certainty, and would not be unduly burdensome to prospective bidders." Securities Exchange Act Release No. 16,385 [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,374, at 82,604-05 (November 29, 1979). The SEC has also new proposed legislation that would replace § 14(d) with a statute reaching any acquisition of 10% or more of a company's equity securities, no matter how achieved. The proposal aims to avoid current definitional problems, increase certainty and reduce the regulatory burdens and litigation. Letter from SEC Chairman Harold Williams to Sen. Wm. Proxmire [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,453, at 82,911 (February 15, 1980).

94. [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,374, at 82,603-04. The second tier uses no specific percentage test, time period or number of offerees or solicitees. *See id.* at 82,603.

95. *See* notes 73-79 and accompanying text *infra*.

96. *See* note 12 *supra*.

97. *See* 1972 DUKE L.J. 1051, 1059. Many important terms in securities law, such as 'security' itself, and in other statutory fields remain undefined, and courts have acknowledged that this

Arguably, *Wellman* will discourage private purchases aimed at transferring corporate control, further insulating complacent and inefficient managements from challenge. Actually, however, *Wellman* only discourages disguising tender offers to circumvent the Williams Act advance disclosure requirements. Williams Act coverage of these transactions is important because target shareholders deserve protection from unidentified purchasers with unknown plans for the company's future, and from secret, noncompetitive bidding that denies selling shareholders opportunities to realize full economic value for the shares.

No case involving an unorthodox takeover has presented facts so compelling for expansion of the term "tender offer" as does *Wellman v. Dickinson*. Sun's tactics, which sought to travel just on the recognized boundary of the tender offer concept, were indeed "infected with the basic evil which Congress sought to cure."⁹⁸ Judge Carter relied on legislative history and the philosophy behind the 1934 Act in distinguishing the limited views of "tender offer" elsewhere. The court, in reaching its holding, inadequately treated some perplexing failures and ambiguities in the Williams Act's history, structure, content and judicial interpretation. It left unanswered questions about how "widespread" solicitation must be, and what, if any, numerical limits should control. Future cases and SEC rulings may settle these issues and others. This decision remains important for its reasoned approach to a hard problem, when pedantic orthodoxy would have denied the spirit of the Williams Act.

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practice intended to preserve flexibility in achieving congressional intent. See, e.g., *Appalachian Coal, Inc. v. United States*, 288 U.S. 344, 345 (1933) (construing antitrust statutes).

98. 475 F. Supp. at 822.